Immunocept, LLC, et al v. Fulbright & Jaworski Doc. 95

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
MAR 23 2006
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ______ DEPUTY CLERK

IMMUNOCEPT, LLC, PATRICE ANNE LEE, AND JAMES REESE MATSON §
§
Plaintiffs, §
§
v. § CAUSE NO. A050A334 SS
§
FULBRIGHT & JAWORSKI, LLP, §
§
Defendant. §

FULBRIGHT'S RESPONSE TO PLAINTIFFS' MOTION TO COMPEL TESTIMONY, RESPONSES TO INTERROGATORIES, AND RESPONSES TO REQUESTS FOR PRODUCTION REGARDING FULBRIGHT'S NET WORTH

TO THE HONORABLE JUDGE OF THIS COURT:

COMES NOW, Fulbright & Jaworski, LLP ("Fulbright"), Defendant in the above-entitled and numbered cause, and files this Response to Plaintiffs' Motion to Compel Testimony, Responses to Interrogatories, and Responses to Requests for Production Regarding Fulbright's Net Worth, and in support thereof would respectfully show the Court as follows:

I. INTRODUCTION

The Plaintiffs have sued Fulbright, claiming that Fulbright was negligent in prosecuting a patent on a process known as large-pore hemofiltration. In their Amended Complaint, the Plaintiffs allege that Fulbright committed "grossly negligent conduct." The Plaintiffs have sought discovery regarding Fulbright's net worth – information that would not be relevant unless Plaintiffs can raise some evidence of grossly negligent conduct.

As a threshold matter, Plaintiffs have not filed their Motion to Compel in a timely fashion, as required by the Local Rules of the Western District of Texas. Furthermore, the

95

Dockets.Justia.com

information sought is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Because the Plaintiffs have neither pled nor can make a *prima facie* case of conduct making possible the recovery of punitive damages, Fulbright respectfully asks this Court to leave in effect its order issued on November 7, 2005, such that the Plaintiffs "shall have no discovery regarding [Fulbright's] net worth . . . ."

II. ARGUMENT AND AUTHORITIES

A. Plaintiffs' Motion to Compel is late under the Local Rules

The Court set the discovery cutoff in this case as February 13, 2006. The discovery requests for which Plaintiffs have now filed their Motion to Compel were served by facsimile on January 25, 2006. Accordingly, Fulbright's responses to those requests were not due until February 27, 2006 – two weeks after the discovery cutoff.

The Western District of Texas's Local Rule CV-16(d) provides, in part:

> Written discovery is not timely unless the response to that discovery would be due before the discovery deadline. The responding party has no obligation to respond and object to written discovery if the response and objection would not be due until after the discovery deadline.

Although Fulbright did "respond and object" to the written discovery served on January 25, 2006, it was under no obligation to do even that.[1] Plaintiffs cannot now seek to compel Fulbright to respond to Plaintiffs' untimely discovery requests. Indeed, another portion of Local Rule 16(d) makes this clear:

---

[1] Fulbright has not previously insisted upon strict adherence to Local Rule CV-16(d), as the parties have been generally flexible in attempting to accomplish meaningful discovery. However, Plaintiffs have recently made it clear that they refuse to respond to any discovery request that would be due after the discovery deadline. (**Exhibit H**, E-mail from Plaintiffs' counsel). Plaintiffs have taken this position despite the fact that it applies to their own discovery requests seeking information regarding Fulbright's net worth. Although Fulbright has previously responded to and objected to Plaintiffs' requests on the merits rather than relying upon Local Rule CV-16(d), Plaintiffs declined to reciprocate the courtesy: Plaintiffs have invoked Rule CV-16(d) and refused to respond to Fulbright's discovery requests, complaining that they were not served in time to require responses before the discovery cutoff, (**Exhibits D and E**), and should be barred from obtaining the net worth discovery based on the same rationale.

> Absent exceptional circumstances, no motions relating to discovery, including motions under Rules 26(c), 29, and 37, shall be filed after the expiration of the discovery deadline . . . .

Because Plaintiffs have filed their Motion to Compel after the expiration of the discovery deadline (without suggesting any "exceptional circumstances"), and because they are trying to compel Fulbright to respond to discovery requests to which the Local Rules affirmatively state there is no obligation to provide a response, the Motion to Compel should be denied without even reaching its merits.

B. The Court has discretion to deny discovery regarding Fulbright's net worth

If this Court should reach the merits of Plaintiffs' Motion to Compel, the relief requested still should be denied. Fulbright carefully maintains and guards its financial information regarding net worth. The disclosure of such confidential, proprietary, and private business and financial information would result in harm to Fulbright. Fulbright's financial statements and financial information are relevant in this lawsuit only upon a finding by a trier of fact that Plaintiff is entitled to the recovery of punitive damages. While the net worth may be discoverable to a claim of exemplary damages, the Texas Supreme Court has declined to "circumscribe . . . a trial judge's authority to consider on motion whether a party's discovery request involves unnecessary harassment or invasion of personal or property rights." *Lunsford v. Morris*, 746 S.W.2d 471, 473 (Tex. 1988); *see In re Jerry's Chevrolet-Buick, Inc.*, 977 S.W.2d 565 (1998) (Gonzalez, J., dissenting) (explaining that the Texas Supreme Court has "yet to address when and on what basis a party is entitled to discover [financial and net worth] information").

C. The Plaintiffs pled no facts supporting a gross negligence claim

Federal Rule of Civil Procedure 26(c) confers broad discretion on this Court to decide when a protective order is appropriate and what degree of protection is required. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Such judicial discretion should be exercised with respect to financial information when, as here, the Plaintiffs have offered nothing more than the conclusory statement that gross negligence has been committed, without alleging any supporting facts.

Chenoweth v. Schaaf is instructive. 98 F.R.D. 587 (W.D. Pa. 1983). In *Chenoweth*, the plaintiff's complaint alleged negligence and then summarily declared that "the actions of the defendants hereinabove and hereinafter referred to were careless, reckless, wanton and grossly negligent and therefore, plaintiff seeks punitive damages." *Id.* at 589. The court did not permit discovery of information regarding the defendants' financial status, explaining:

> We . . . hold that from the face of the complaint, ***nothing other than statements, conclusive in nature, are included*** from which ***the Court is unable to say that there is a real possibility that punitive damages will be an issue***, sufficient to allow the information requested.

Id. at 589-90 (emphasis added); *see also John Does I-VI v. Yogi*, 110 F.R.D. 629, 633 (D. D.C. 1986) ("[T]he Court will extend limited protection to discovery concerning defendants' financial status. This discovery is relevant, but should not be revealed until necessary to prove up punitive damages.").

The Amended Complaint filed by the Plaintiffs in this case, like the *Chenoweth* complaint, does not allege sufficient facts to entitle the Plaintiffs to the discovery they seek, as it does not provide the Court with information suggesting there is "a real possibility that punitive damages will be an issue." The Plaintiffs allege no facts regarding any particular acts that Fulbright took that were negligent, much less grossly negligent. They point to no language in the patent that they claim resulted from the alleged negligence, and merely state that Fulbright's "conduct fell below the standard of care which would have been exercised by reasonable patent attorneys." Amended Complaint, ¶ 19. A few paragraphs later comes the brash declaration that "the grossly negligent conduct described in this complaint entitles Plaintiffs to recover exemplary damages." But there is no "conduct" described in the Amended Complaint at all – the Plaintiffs just claim that the wording of the patent was "poorly done," with no further explanation. Without at least pleading adequate facts and then presenting some evidence regarding gross negligence, the Plaintiffs should not be entitled to rummage around in Fulbright's financial data.

D. The Plaintiffs have not made out a prima facie case of gross negligence

Even if they had adequately ***pled*** grossly negligent acts, Plaintiffs have failed to elicit the required evidence and to procure the necessary expert witness testimony to even suggest that they might recover exemplary damages at trial.

The definition of gross negligence in Texas incorporates an objective and a subjective prong and reads as follows:

> "Gross negligence" means an act or omission:
>
> (A) which when viewed ***objectively*** from the standpoint of the actor at the time of its occurrence ***involves an extreme degree of risk***, considering the probability and magnitude of the potential harm to others; and
>
> (B) of which the actor has actual, ***subjective awareness*** of the risk involved, but nevertheless ***proceeds with conscious indifference*** to the rights, safety, or welfare of others.

TEX. CIV. PRAC. & REM. CODE § 41.001(11) (emphasis added). To recover the exemplary damages they seek, Plaintiffs must prove the elements of gross negligence by the heightened standard of "clear and convincing evidence." TEX. CIV. PRAC. & REM. CODE § 41.003(a).

Compare Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 31 (Tex. 1994). This standard, which applies to all claims of gross negligence filed on or after September 1, 2003,[2] calls for heightened scrutiny by the courts as to the showing required for gross negligence. *See, e.g.*, *Diamond Shamrock Refining Co. v. Hall*, 168 S.W.3d 164, 170 (Tex. 2005) (setting forth the standard for an appellate court's review of the legal sufficiency of evidence to support a finding of gross negligence).

Plaintiffs have no gross-negligence evidence. As to gross negligence's objective prong, Plaintiffs have no expert testimony regarding whether an "extreme degree of risk" existed when viewed from the standpoint of a patent attorney in 1996. With respect to the required subjective showing, Plaintiffs have no evidence – much less "clear and convincing evidence" – that a Fulbright attorney had any "subjective awareness" of a risk.

1. Plaintiffs' patent expert did not consider objective element of gross negligence

Plaintiffs' patent expert MacPherson did not mention gross negligence or any of its elements in his report. (**Exhibit A.**) He was not even asked by the Plaintiffs to express an opinion on gross negligence. (**Exhibit B**, pp. 87-88.) *He does not even know what the standard is in Texas for determining gross negligence.* (**Exhibit B**, pp. 92-93.) He "would be speculating" to answer whether it is an objective or subjective standard (it is both). (**Exhibit B**, p. 93.) Nor did he evaluate one of the key prongs set forth in Texas statutes for determining gross negligence: the degree of risk that might have been involved in a defendant's acts or omissions. (**Exhibit B**, p. 93.) *See* TEX. CIV. PRAC. & REM. CODE § 41.001(11)(A).

As an initial matter, the Court's Scheduling Order provided that opinions not contained in

[2] Acts 2003, 78th Leg., ch. 204 rewrote subsection (a)(3), which formerly read: "(3) wilful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of 'gross neglect' in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B)."

an expert report's summary will not be permitted at trial (**Exhibit C,** ¶ 4.) Further, as has been held on multiple occasions by the Texas courts, "[w]hen asked to state an opinion regarding a defendant's negligence or gross negligence, ***the witness must be provided with the proper legal standard as a predicate***." *Pittsburgh Corning Corp. v. Walters*, 1 S.W.3d 759, 777 (Tex. App.—Corpus Christi 1999, pet. denied)(emphasis added). "[B]efore a testifying expert's opinion can be rendered, a predicate must be laid showing that the expert is familiar with the proper legal definition in question." *Isern v. Watson*, 942 S.W.2d 186, 193 (Tex. App.—Beaumont 1997, no writ); *see Birchfield v. Texarkana Mem'l Hosp.*, 747 S.W.2d 361, 365 (Tex. 1988) (expert's opinion must be "based on proper legal concepts"). A federal circuit court has come to the same conclusion, finding "[t]he district court properly struck the testimony of [the] proffered expert . . . because of [the expert's] inability to articulate an accurate definition of gross negligence." *See*, *Stewart Title Guar. Co. v. Linowes & Blocher*, 917 F.2d 566, 1994 WL 689122, at *5 (4th Cir. 1994) (unpublished table decision) (per curiam).

In the absence of an expert to testify regarding gross negligence, the jury would be left to determine for itself what, through the eyes of a patent attorney in the mid-1990s, constitutes "an extreme degree of risk." As a general proposition, issues relevant to the propriety of the acts or omissions of a lawyer require expert testimony. *See Geiserman v. MacDonald*, 893 F.2d 787, 793 (5th Cir. 1990) ("In most legal malpractice cases, 'expert testimony is necessary to establish the standard of care since only an attorney can competently testify to whether the defendant comported to the prevailing legal standard.'"). Tellingly, Plaintiffs' Motion to Compel attempts to fill in the gaping hole that MacPherson left in their gross negligence case: they declare that "Fulbright should have known that this conduct exposed Plaintiffs to an ***extreme degree of risk***." (Motion to Compel, p. 5.) This conclusory proclamation is unsupported by Plaintiffs' patent expert (who did not evaluate degree of risk), and does not entitle Plaintiffs to the discovery they seek.

2. *Plaintiffs have no evidence of the subjective element of gross negligence*

Plaintiffs also have no evidence that Fulbright had "actual, subjective awareness of the risk involved" (or, for that matter, that Fulbright proceeded "with conscious indifference to the rights, safety, or welfare of others"), and so cannot prove the subjective prong required for a showing of gross negligence. TEX. CIV. PRAC. & REM. CODE § 41.001(11)(B). Plaintiffs' expert himself stated that, even after reviewing the prosecuting attorney's deposition (**Exhibit B**, p. 38), he did not "know that [the prosecuting attorney] knew of the risk that she was creating . . . ." (**Exhibit B**, p. 96.) He actually undercuts the Plaintiffs' required showing that there was "actual, subjective awareness" on the part of the prosecuting attorney: "Well, ***I think that she was not aware*** of what the potential impact would be of using the phrase 'consisting of' . . . ." (**Exhibit B**, p. 96 (emphasis added).)

Plaintiffs and their expert should not be able to engage in hand-waving to bring the baseless charge that any Fulbright attorney had "actual, subjective awareness of the risk involved." They have no expert testimony to define what the alleged extreme degree of risk would be, and certainly have not pointed to any Fulbright attorney's knowledge thereof. They need some evidence of "actual, subjective awareness," and have presented none to this Court in the Motion to Compel. Even when setting forth arguments unrestrained by any evidence citation, Plaintiffs still do not meet the requisite standard for gross negligence. As quoted above, they state only what, in their view, "Fulbright ***should*** have known." (Motion to Compel, p. 5 (emphasis added).) That is a statement about what Fulbright ***objectively*** should have known. Plaintiffs fail to even argue about an "***actual, subjective awareness***" on the part of Fulbright.

Fulbright has filed a Motion to Exclude the Testimony of MacPherson that specifically challenges any testimony he might offer regarding gross negligence, as well as a Motion for Summary Judgment as to, among other things, the claim of gross negligence. Plaintiffs have no legitimate need for net worth information, and the discovery requests at issue are unfounded and unreasonable.

III. CONCLUSION AND PRAYER

For the foregoing reasons, Fulbright respectfully requests this Court to stand by its order protecting Fulbright from discovery requests relating to Fulbright's net worth, to deny the requested discovery, and to deny in all respects Plaintiffs' Motion to Compel Testimony, Responses to Interrogatories, and Responses to Requests for Production Regarding Fulbright's Net Worth.

Respectfully submitted,

BECK, REDDEN & SECREST
A Registered Limited Liability Partnership

By: Connie H. Pfeiffer
David J. Beck
Texas Bar No. 00000070
Jeff Golub
Texas Bar No. 00793823
Geoff A. Gannaway
Texas Bar No. 24036617
Connie H. Pfeiffer
Texas Bar No. 24046627
1221 McKinney St., Suite 4500
Houston, Texas 77010-2010
Telephone: (713) 951-3700
Facsimile: (713) 951-3720

ATTORNEYS FOR DEFENDANT FULBRIGHT & JAWORSKI, LLP

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served as shown below on counsel of record on March 22, 2006.

Via Certified Mail, Return-Receipt Certified
Michael P. Lynn, P.C.
Jeffrey M. Tillotson, P.C.
John D. Volney
Jeremy Fielding
Lynn Tillotson & Pinker, LLP
750 N. St. Paul St., Suite 1400
Dallas, Texas 75201

Connie Pfeiffer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Notice of Document/Attachment(s) Not Imaged but Stored with Document in Case File

See Original File to View/Copy Document/Attachment(s)

Civil Case No. A:05-CA-334 SS

Immunocept LLC et al.

VS.

Fulbright & Jaworski LLP

Attachments to Document #: 95

Description: Fulbright's Response to Plaintiffs' Motion to Compel Testimony, Responses to Interrogatories, and Responses to Requests for Production Regarding Fulbright's Net Worth

File Date: March 23, 2006

Prepared by: dm

This sheet to be imaged as the last page.